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January 17, 2006

VIA ELECTRONIC FILING AND UPS

Ms. Mary Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, Second Floor
Boston, Massachusetts 02110

Re: *D.T.E. 04-33: Petition of Verizon New England Inc. for Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts, Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*

Dear Ms. Cottrell:

On behalf of the Competitive Carrier Coalition (RCN and DSLNet), the Competitive Carrier Group,[1] and Conversent Communications of Massachusetts, Inc. (the "CLEC Parties"), please find enclosed for filing in the above-referenced matter the CLEC Parties' Brief on Remaining Arbitration Issues. Enclosed please also find seven (7) copies of this filing, a duplicate and self-addressed, postage-paid envelope. Please date-stamp the duplicate on receipt and return it in the envelope provided.

Please feel free to contact the undersigned counsel at (202) 887-1211 if you have any questions or require further information.

Respectfully submitted,

Brett Heather Freedson

cc: Service List Parties (via email)

[1] The following members of the Competitive Carrier Group are parties to this filing: A.R.C. Networks Inc. d/b/a InfoHighway Communications, DIECA Communications, Inc. d/b/a Covad Communications Company, XO Communications Services, Inc. (formerly Allegiance Telecom of Massachusetts, Inc. and XO Massachusetts, Inc.).

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

BRIEF OF COMPETITIVE CARRIER COALITION, THE COMPETITIVE CARRIER GROUP, AND CONVERSENT ON REMAINING ARBITRATION ISSUES

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Dated: January 17, 2006

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Introduction

The Competitive Carrier Coalition[1], the Competitive Carrier Group[2], and Conversent Communications of Massachusetts, Inc. (collectively, the "CLEC Parties") have proposed interconnection agreement terms that promote the pro-competitive aims of the Telecommunications Act of 1996 (the "1996 Act"), and Department of Telecommunications and Energy ("the Department") policy. Verizon Massachusetts ("Verizon"), on the other hand, attempts to limit competition by unduly restrictive, sometimes onerous terms that do not comport with the 1996 Act, the rules and orders of the Federal Communications Commission ("FCC"),

[1] The following members of the Competitive Carrier Coalition join this brief: RCN-BecoCom LLC; RCN Telcom Services of Massachusetts, Inc., and DSLNet Communications, Inc. Although the Department found that DSLnet's interconnection agreement did not need to be amended to implement the *TRO* and *TRRO* (Arbitration Order at 12, n.1 & 35; Reconsideration Order at 44 n.16), DSLnet supports this amendment to the extent its rights under its existing interconnection agreement are not waived. *See* Proposed Amendment, § 4.4.

[2] The following members of the Competitive Carrier Group are parties to this brief: A.R.C. Networks Inc. d/b/a InfoHighway Communications, DIECA Communications, Inc. d/b/a Covad Communications Company, and XO Communications Services, Inc. (formerly Allegiance Telecom of Massachusetts, Inc. and XO Massachusetts, Inc.).

and the Department's prior rulings in this case. For the reasons set forth below, the Department should reject Verizon's proposals and instead should adopt those of the CLEC Parties.

Discussion

I. Scope of the Amendment (and related references) — Section 4.4.

These sections address the fundamental issue of the scope of the amendment. The disputed proposals in section 4.4 are as follows (CLEC Parties' proposed language is in ***bold, italicized and underline***):

> Scope of Amendment. This Amendment shall amend, modify and revise the Agreement only to the extent set forth expressly herein. As used herein, the Agreement, as revised and supplemented by this Amendment, shall be referred to as the "Amended Agreement". Nothing in this Amendment shall be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement. ***[This Amendment does not alter, modify or revise any rights and obligations under applicable law contained in the Agreement, other than those Section 251 rights and obligations specifically addressed in this Amendment. Furthermore, ***CLEC Acronym TXT***'s execution of this Amendment shall not be construed as a waiver with respect to whether Verizon, prior to the Amendment Effective Date, was obligated under the Agreement to perform certain functions required by the TRO.]***

The Amendment must expressly state that contract provisions implementing the *Triennial Review Order ("TRO")* and the *Triennial Review Remand Order ("TRRO")* are intended to modify only those specific unbundling rights and obligations, under Section 251(c)(3) of the 1996 Act, that are impacted by those orders of the FCC. To that end, the Amendment must include the contract language proposed by the CLEC Parties, above.[3]

The CLEC Parties' requested language is consistent with the Arbitration Order. The Arbitration Order limits the scope of this proceeding "only to arbitration of terms that are necessary to implement the *Triennial Review Order* and the *Triennial Review Remand Order.*"

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[3] This includes cross references to Section 4.4 that are made in various sections of the Amendment. *See, e.g.*, §§ 2.3; 3.1; 3.2.1; 3.2.2; 3.2.3; 3.2.4; 3.3.2.

Arbitration Order at 53. The Department specifically ruled that its order did not purport to modify any unbundling rights or obligations of the parties under other applicable law.

> We determine that implementation of the FCC's rulings in the *Triennial Review Order* and the *Triennial Review Remand Order* does not require any modification to the underlying agreement's definition of "Applicable Law," and agree with the CCC that nothing in this Amendment should be construed to limit a party's rights or exempt a party from obligations under Applicable Law, as defined in the underlying agreement, except in such cases where the parties have explicitly agreed to a limitation or exception.

Arbitration Order at 238.[4] Thus, the contract language proposed by the CLEC Parties is both consistent with the Arbitration Order, and necessary to limit the scope of the Amendment to changes of law specifically addressed by the Department.

Importantly, the CLEC Parties also seek to include in the Amendment various references to "Section 251(c)(3)," to clarify that certain network elements and facilities referred to in the Amendment are those provided by Verizon under Section 251(c)(3), and not arrangements provided by Verizon under other applicable law. Proposed Joint Amendment (Jan. 17, 2006) at §§ 3.4.1, 3.4.2, 3.4.3.1, 3.5.1, 3.5.2, 3.5.3, 3.5.4, and 3.10. Because the rates, terms and conditions set forth in the Amendment must be limited to Section 251(c)(3) network elements and facilities impacted by the *Triennial Review Order* and the *Triennial Review Remand Order*, such qualifying contract language is necessary to properly define the scope of the Amendment. Moreover, the Arbitration Order expressly permits such references to guide the parties' interpretation of their respective unbundling rights and obligations under the Amendment. *See* Arbitration Order at 45.

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[4] *See id.* at 45 ("The phrase 'Applicable Law,' as currently used throughout the existing interconnection agreements, however, remains consistent with the *Triennial Review Order* and the *Triennial Review Remand Order* law changes; and the broader reference to applicable law, rather than specific statutory provisions will allow the interconnection agreement to respond to those changes.").

II. Loops and Sub-Loops.

A. FTTH and FTTP Loops — Section 3.1.1.

In this Section, two disputes remain. The section currently reads as follows (CLEC Parties' proposed language is in ***bold, italicized and underline***, and Verizon proposed language in **bold**[5]):

> New Builds. Notwithstanding any other provision of the Amended Agreement, …**[*but subject to and without limiting Section 4.4, below*,]** Verizon is not required to provide nondiscriminatory access to a FTTH or FTTC Loop on an unbundled basis when Verizon deploys such a Loop to the customer premises of an end user that has not been served by any loop facility **[other than a FTTH or FTTC Loop]**.

The first dispute relates to Verizon's objection to the CLEC Parties' proposed insertion of *"but subject to and without limiting Section 4.4 below."* However, as discussed above, this insertion is fully justified.

The second dispute relates to Verizon's inclusion of the statement "other than a FTTH or FTTC loop" at the end of this provision. The CLEC Parties oppose Verizon's proposed insertion because such language is not found in the FCC's rule and is otherwise inconsistent with the *TRO*. Specifically, 47 C.F.R. 319(a)(3)(ii) provides as follows:

> New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop or a fiber-to-the-curb loop on an unbundled basis when the incumbent LEC deploys such a loop to an end user's customer premises that previously has not been served by any loop facility.

The FCC rule does not include the phrase that Verizon proposes be inserted at the end of the provision.

In addition, Verizon's proposal is inconsistent with the plain meaning of the rule and the *TRO*. In effect, it expands the FCC's decision that granted unbundling relief to "new builds" to include end users that have been served by "old or existing" FTTH or FTTC loop facilities.

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[5] This convention is used throughout the proposed amendment as well as in this brief.

Verizon's proposed language contravenes the FCC's rule because the FCC's definition specifically states that the new build rule only applies to those customer locations that have not been served by "*any* loop facility." Therefore, customers previously served by FTTH or FTTC loops do not fall within the new build definition. The fact that FCC Rule 51.319(a)(3) is entitled "new builds" further demonstrates this. Finding otherwise would be contrary to the plain language and meaning of the FCC rule.

Furthermore, the FCC's statements in the *TRO* are unequivocal and support the rejection of Verizon's proposed language. The FCC specifically held that "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops." The FCC further emphasized that it does not require "incumbent LECs to provide unbundled access to *new* FTTH loops for either narrowband or broadband services." *TRO,* ¶ 275 (emphasis added). Contrary to Verizon's position, the FCC never held that "old or existing" FTTH or FTTC loop facilities that serve a customer fall within the definition of the new build rule.

The Department recognized this in the Arbitration Order. In particular, it found that "a new build is by definition, a deployment where the customer has not previously been served by any loop facility" and that "CLECs were never entitled to any loop facilities at that location." Arbitration Order at 178 (citing 47 C.F.R. § 51.319(a)(3)(ii)). The Department never expanded the new build FTTH definition to include customer locations that have been served by "old or existing" FTTH or FTTC loop facilities. Nor would it because doing so would be "inconsistent with the savings clauses of §§ 251(d)(3), 252(e)(3), and 261, which explicitly preserve the Department's authority to apply state law that is consistent with, and does not substantially prevent implementation of, the federal unbundling rules." *See* Arbitration Order at 43 (citing

Consolidated Order, D.T.E. 03-60/04-73, at 21-23). Rather, in the Arbitration Order, the Department's rulings tracked the specific language of the FCC rules.

For the above reasons, the Department should reject Verizon's proposed language and accordingly limit the application of Section 3.1.1 as required by FCC rule, 47 C.F.R § 319(a)(3)(ii).

B. UDLC Loops — Section 3.2.4.2.

In the section, the following disputed language remains:

> If neither a copper Loop nor a Loop served by UDLC is available, then Verizon shall offer to provision a Loop by constructing the necessary copper Loop or UDLC facilities or such other technically feasible option, such as any technically feasible option identified in note 855 of the *TRO*, that Verizon in its sole discretion may determine to offer. If Verizon offers to provision a Loop by constructing the necessary copper Loop or UDLC facilities, then Verizon shall construct such copper Loop or UDLC facilities upon request of ***CLEC Acronym TXT***. In addition to the rates and charges payable in connection with any unbundled Loop so provisioned by Verizon, ***CLEC Acronym TXT*** shall be responsible for the following charges to the extent provided for in the Pricing Attachment to this Amendment**[; provided, however, that the following charges shall apply even if not provided for in the Pricing Attachment to this Amendment in cases where Verizon offers, and ***CLEC Acronym TXT*** requests, construction of the necessary copper Loop or UDLC facilities]** ***[only if ***CLEC Acronym TXT*** requests the construction of a copper Loop or UDLC facilities when Verizon has proposed to provide a different less costly method of technically feasible access]***: (a) an engineering query charge for preparation of a price quote; (b) upon ***CLEC Acronym TXT***'s submission of a firm construction order, an engineering work order nonrecurring charge; and (c) construction charges, as set forth in the price quote. If the order is cancelled by ***CLEC Acronym TXT*** after construction work has started, ***CLEC Acronym TXT*** shall be responsible for cancellation charges and a pro-rated charge for construction work performed prior to the cancellation.

The Department should adopt the CLEC Parties' proposed language because it is consistent with the Arbitration Order. The CLEC Parties' proposal requires that a CLEC pay for loop construction only if Verizon has proposed to provide a less costly method of technically feasible access. In the Arbitration Order, the Department specifically held that Verizon "may not apply its proposed charges for these IDLC-related services," except "where a CLEC specifically

requests new construction, notwithstanding Verizon's determination to provide a different, less-costly method of 'technically feasible' access. In that case, Verizon may charge the CLEC for constructing the loop." Arbitration Order at 194. Verizon never sought reconsideration of the ruling, and it remains binding and effective.

The Department should not disturb this conclusion. The *TRO* makes clear that Verizon is not excused from its obligation to provide unbundled Hybrid Loops where it has deployed Integrated Digital Loop Carrier ("IDLC") systems. The FCC "recognize[d] that providing unbundled access to hybrid loops served by a particular type of DLC system, *e.g.*, Integrated DLC systems, may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems." *TRO* ¶ 297.[6] Despite this finding, the FCC explicitly held, "Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems." *Id.* This rule does not necessarily require Verizon to unbundle an IDLC loop, so long as it provides CLECs with some other unbundled loop serving the same customer premises.

The CLEC Parties' proposed solution is consistent with the Arbitration Order and a straightforward implementation of the *TRO*. The CLEC Parties' proposal does not mandate any particular form of access where IDLC loops are present; instead, it affords Verizon the discretion to choose which form of access to provide and permits Verizon to assess costs for loop construction only if the CLEC requests the construction of a copper Loop or UDLC facilities

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[6] The FCC further explained:

> These differences stem from the nature and design of Integrated DLC architecture. Specifically, because the Integrated DLC system is integrated directly into the switches of incumbent LECs (either directly or through another type of network equipment known as a "cross-connect") and because incumbent LEC's typically use concentration as a practice for engineering traffic on their networks, a one-for-one transmission path between an incumbent's central office and the customer premises may not exist at all times. *Id.*

when Verizon has proposed to provide a different, less costly method of technically feasible access.

The purpose of this requirement is to prevent Verizon from "satisfying" its obligation to provide access to IDLC loops by forcing CLECs to pay Verizon to construct the most expensive solution Verizon can think of, even when less expensive solutions were possible. In addressing a similar issue, the Illinois Commerce Commission explained that such an approach "allows SBC the discretion to manage its network but protects CLECs from unneeded construction charges when alternatives exist." *Access One, Inc. et al. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Docket No. 05-0422, Arbitration Decision, at 199 (I.C.C. Nov. 2, 2005).[7]

The *TRO* notes that in most cases, the ILEC would be able to provide unbundled access using a spare copper loop or through a reconfiguration of the DLC into a UDLC architecture. *TRO,* 297. The *TRO*, however, makes clear that "if neither of these options is available, incumbent LECs must present requesting carriers a technically feasible method of unbundled access." *Id.* The CLEC Parties' proposal is a simple safeguard that protects CLECs against any attempts by Verizon to impose unjustified charges for constructing a loop when in fact no such construction is necessary. The CLEC Parties have agreed to grant flexibility to Verizon to decide which "technically feasible method" of access to offer to a CLEC, so that Verizon can maintain control over its network design. Verizon should not be permitted to use this flexibility, however, as a ruse to effectively deny CLEC access by offering the slowest, most expensive

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[7] Available at http://eweb.icc.state.il.us/e-docket/.

"alternative" it can devise. Verizon's proposed language will allow it to do just that. Therefore, the CLEC Parties' proposal is based on the premise that Verizon cannot offer only to construct a new copper loop, at CLECs' expense, when any quicker, less expensive alternative is also readily possible.

It should be noted that Verizon's BOC counterpart, SBC, admitted that in fact it will almost never be forced to choose between loop construction and unbundled IDLC. The *TRO* cited a letter from SBC in which "SBC explains that, for 99.88% of SBC's lines served over Integrated DLC, competitive LECs have access to Universal DLC or spare copper facilities as alternatives to the transmission path over SBC's Integrated DLC system."[8] Thus, the most important purpose of the CLEC Parties' proposal is not to govern the very rare instances in which it might be necessary for Verizon to choose between providing access to an IDLC or building a new copper loop. Instead, the primary objective of the CLEC Parties' proposal is to assure that Verizon does not try to subject CLECs to loop construction charges when no such charges are appropriate. In other words, the CLEC Parties fear that without the proposed safeguard, Verizon may try to use the complexities of IDLC unbundling as a smokescreen to claim that loop construction would be needed in some of the 999 of every 1000 loop orders in which spare copper or UDLC are available.

The CLEC Parties' proposal is lawful as it is consistent with the *TRO* and the Department's Arbitration Order. Moreover, it would remove from Verizon's arsenal the ability to impose unnecessary and wasteful costs on CLECs to build new loops when existing loops are readily available. One of the fundamental purposes of the Act's unbundling requirement is to avoid such unnecessary duplication where, as is the case here, CLECs are impaired without such

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[8] *TRO,* at n.854, citing Letter from Jim Lamoureux, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 at 1 (filed Dec. 10, 2002) (SBC Dec. 10, 2002 *Ex Parte* Letter) (describing DLC deployment in SBC's region).

access. Therefore, the Department should adopt the CLEC Parties' proposal and reject Verizon's.

C. Single Point of Interconnection — Sections 3.3.1.2.1 & 3.3.1.2.2

In these sections, the following disputed language remains:

3.3.1.2.1 In accordance with 47 C.F.R. § 51.319(b) and the Arbitration Order, upon request by ***CLEC Acronym TXT*** and provided that the conditions set forth in Subsections 3.3.1.2.1.1 and 3.3.1.2.1.2 are satisfied, the Parties shall negotiate in good faith [an amendment to the Amended Agreement] *[a master agreement]* **memorializing the** *[general]* **terms**[,] *[and]* **conditions [**and rates**] under which Verizon will provide a single point of interconnection at a multiunit premises suitable for use by multiple carriers**[*, together with schedules that will contain the specific terms and rates for the specific SPOI]*:

3.3.1.2.1.1 Verizon has distribution facilities to the multiunit premises, and owns, controls, or leases, the House and Riser Cable at the multiunit premises; and

3.3.1.2.1.2 ***CLEC Acronym TXT*** states in the above request that it intends to place an order for access, via the newly provided single point of interconnection, to an unbundled Sub-Loop network element that Verizon is required to provide to ***CLEC Acronym TXT*** under the Amended Agreement.

3.3.1.2.2 If the Parties are unable to agree on the rates, terms and conditions under which Verizon will provide a SPOI, then either Party may, in accordance with Section 252 of the Act, petition the Department to intercede and promote a resolution. For the avoidance of any doubt, once the Parties have executed **[an amendment]** ***[a master agreement]*** setting forth the **[rates,]** terms**[,]** and conditions under which Verizon will provide a SPOI, disputes regarding implementation of **[the]** ***[such]*** **[rates,]** terms**[,]** and conditions of such Amendment ***[or regarding the specific terms, conditions or rates for a particular SPOI]*** shall be resolved pursuant to the applicable dispute resolution provisions of the Agreement.

Here the dispute between the parties is whether, upon a CLEC's request, Verizon must negotiate (1) a master agreement that would contain the general provisions under which Verizon would provide single points of interconnection (SPOI) at multiunit premises to the CLEC that

includes schedules which contain the specific terms and rates for each SPOI, as the CLEC Parties propose; or (2) separate and distinct amendments to the interconnection agreement for each SPOI in the state, as Verizon proposes.

The CLEC Parties' proposed language is abundantly just, reasonable, and practical whereas Verizon's proposal is not. Verizon seeks to have CLECs negotiate a separate amendment, which includes all the *general* terms and conditions as well as specific terms, for each building where it is required to provide a SPOI. Such a requirement is ludicrous and plainly unnecessary. Surely, the Department would not tolerate Verizon's requiring a full-blown amendment for each and every UNE loop or facility that a CLEC orders. Verizon's SPOI proposal is tantamount to that.

More importantly, the realities of Verizon's proposal is that it will significantly delay CLECs from accessing Verizon's SPOIs and, thereby, prevent CLECs from being able to serve potential customers at hundreds or even thousands of buildings in Verizon's region on a timely basis. Presumably, under Verizon's proposal, each SPOI amendment would would be subject to the Section 252 negotiation and arbitration timetables. If Verizon's language were adopted, CLECs would likely lose such opportunities because customers expect timely service and have little tolerance for delays. Knowing this, Verizon would have every incentive to delay and protract negotiations of terms and conditions associated with each new amendment needed for every SPOI that Verizon must provide at a multiunit premises. Such an incentive and result is contrary to the competitive spirit and intent of the Act.

Unlike Verizon's approach, the CLEC Parties' proposal is eminently reasonable. It requires that parties enter into one *master agreement* that contains all the *general* terms and conditions that apply when a CLEC accesses one of Verizon's SPOIs. There is no need to have

such general terms renegotiated each time a CLEC requests access to a SPOI as Verizon proposes. Moreover, the CLEC Parties' approach includes schedules that permit Verizon to propose and tailor specific terms and rates associated with a specific SPOI at a multiunit premises that a CLEC seeks to access. Although such schedules would need to be negotiated each time a CLEC requests that Verizon provision a SPOI at a specific multiunit premises, the amount of negotiations needed would be curtailed dramatically if a master agreement is already in place. As a result, Verizon's ability to protract the negotiations and impede a CLEC's access to a SPOI would be limited.

The CLEC Parties' proposed language also fully and properly captures the Department's intent in the Arbitration Order. The use of schedules does "not require [Verizon] to negotiate the specific rates, terms, and conditions of SPOI construction until a CLEC makes a request for interconnection at a multiunit premises" and "allows the parties to tailor the terms to the specific circumstances of each location." Arbitration Order at 217. Moreover, having a master agreement in place enables "Verizon . . . to streamline the negotiation process for subsequent SPOI requests." Arbitration Order at 217.

For the foregoing reasons, the Department should adopt the CLEC Parties' proposed language and reject Verizon's proposal.

III. Dedicated Transport.

A. Improper Restrictions on Dedicated Transport — Section 4.7.4.

In this section, the following disputed language remains (Verizon proposed language in **bold):**

> Dedicated Transport. Dedicated Transport includes Verizon transmission facilities**[, within a LATA,]** between Verizon Wire Centers or switches (including Verizon switches with line-side functionality that terminate loops and are located at ***CLEC ACRONYM TXT***'s premises), or between Verizon Wire Centers or switches and switches owned by requesting telecommunications

> carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

Verizon proposes that the definition of Dedicated Transport be limited to "within a LATA." Stunningly, Verizon continues to litigate this definition even though the Department has already addressed and resolved this issue. In the Arbitration Order, the Department rejected Verizon's definition of Dedicated Transport that included "within a LATA." Arbitration Order at 97 and 103. Instead, the Department adopted AT&T's definition, which does not include this phrase, and therefore is consistent with the FCC's definition:

> [D]edicated transport includes incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs, or between wire centers or switches owned by incumbent LECs and switches owned by requesting telecommunications carriers, including, but not limited to, DS1-, DS3-, and OCn-capacity level services, as well as dark fiber, dedicated to a particular customer or carrier.

47 C.F.R. § 51.319(e)(1); *see* Arbitration Order at 103.

Verizon has no right to oppose the CLEC Parties' proposed definition at this time. It did not seek reconsideration of this aspect of the Department's Arbitration Order. In fact, it only sought clarification of the definition of Dedicated Transport that related to reverse collocation. Reconsideration Order at 40.

With the exception of the following phrase in the above definition of Dedicated Transport "(including Verizon switches with line-side functionality that terminate loops and are located at ***CLEC ACRONYM TXT***'s premises)" that was required pursuant to page 103 of the Arbitration Order and page 40 of the Reconsideration Order along with the reference to Verizon instead of incumbent LECs, the CLECs' definition of Dedicated Transport tracks the FCC's definition verbatim. Contrary to Verizon's proposal, there is no limitation in the definition of Dedicated Transport that confines it to locations within a LATA. The FCC's definition plainly and unambiguously lacks a provision limiting Dedicated Transport to points within a LATA.

For the foregoing reasons, the Department should reject Verizon's attempt to include such a restriction, as it has no place in the definitions of Dedicated Transport ordered by the FCC and the Department.

B. Definition of Dark Fiber Transport — Section 4.7.4.

Verizon has proposed to include a definition of "dark fiber transport" in the amendment. The CLEC Parties oppose including any definition of "dark fiber transport."

Verizon's proposal directly violates the Department's specific ruling that the amendment should not include a definition of dark fiber transport. Arbitration Order at 103. That is sufficient reason to reject Verizon's proposal.

If the Department nonetheless determines that it is appropriate to include a definition of dark fiber transport, Verizon's definition is improper. It does not comport with the definition contained in the FCC regulations. The FCC's definition is simple: "Dark fiber transport consists of unactivated optical interoffice transmission facilities." 47 C.F.R. § 51.319(e)(2)(iv). If the amendment is to define dark fiber transport, then the Department should require use of the FCC's definition.

In particular, the Department should reject Verizon's improper attempt to restrict dark fiber transport to locations within a LATA. That restriction simply is not contained in the FCC regulations. Since the FCC regulations are unambiguous, the Department should apply them. Moreover, dark fiber transport is a type of "dedicated transport," which is governed by section 51.319(e). As demonstrated in the preceding section, there is no limitation on dedicated transport that confines it to locations within a LATA. Therefore, the Department should reject Verizon's improper attempt to restrict the definition of dark fiber to points within a LATA.

IV. Loop and Transport Caps — Sections 3.4.1.1.2, 3.4.2.1.2, 3.5.1.1.2, 3.5.2.1.2.

In its proposed amendment, Verizon attempts improperly to restrict the ability of CLECs to order UNEs by making the various numerical caps applicable to a CLEC "and its Affiliates." For example, in section 3.4.1.1.2, Verizon attempts to apply the cap of ten DS1 loops in any single building to a CLEC and its affiliates collectively. Verizon proposes the same provision in section 3.4.2.1.2 with respect to DS3 loops; section 3.5.1.1.2, with respect to DS1 dedicated transport; and section 3.5.2.1.2, with respect to DS3 dedicated transport.

All of these Verizon proposals are improper. The applicable FCC regulations are clear that the caps apply only to particular CLECs, not to the CLEC plus all its affiliates. For example, with respect to DS1 loops, 47 C.F.R. § 51.319(a)(4)(ii) provides:

> Cap on unbundled DS1 loop circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 loops to any single building in which DS1 loops are available as unbundled loops.

Similarly, section 51.319(a)(5)(ii) states:

> Cap on unbundled DS3 loop circuits. A requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any building in which DS3 loops are available as unbundled loops.

The FCC regulations establishing caps for DS1 dedicated transport, § 51.319(e)(2)(ii)(B), and DS3 dedicated transport, § 51.319(e)(2)(iii)(B), likewise say nothing about affiliates.

Verizon's additional language regarding affiliates simply is not contained in the FCC regulations. When the FCC has wanted to include affiliates in determining eligibility to obtain UNEs, it has done so explicitly. *E.g.,* 47 C.F.R. § 51.5, definition of "fiber-based collocator."[9]

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[9] That definition states:

> Fiber-based collocator. A fiber-based collocator is any carrier, *unaffiliated with the incumbent LEC*, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation arrangement within the wire center; (2) leaves the incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC *or any affiliate of the incumbent LEC*, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall

Verizon's attempt to include such language would unlawfully restrict the ability of CLECs to obtain UNEs to which they are unquestionably entitled under the FCC rules. The FCC regulations are clear and unambiguous. The Department should require Verizon to incorporate the FCC regulations, and nothing more, into the amendment. [10]

V. CLEC Certification, UNE Availability Disputes, and Pricing In the Event that Verizon Prevails — Sections 3.6.1.3, 3.6.2.2, and 3.6.2.3.

A. Certification When Ordering TRRO UNEs — Section 3.6.1.3.

Section 3.6.1.3 addresses the method by which CLECs will certify that they are entitled to obtain DS1 and DS3 loops and dedicated transport and dark fiber transport. Verizon proposes to require CLECs to use Verizon's electronic ordering system to make such certification.

There is no FCC or Department requirement that they do so. Nevertheless, the CLEC Parties would agree to certification via Verizon's electronic systems but only "so long as such method is no more onerous than providing certification by letter." VZ opposes the insertion of that limiting phrase.

Verizon's refusal implies that the certification process that it plans to incorporate into its electronic ordering system will be more onerous than a letter. But the Department specifically indicated that a letter would suffice. "While the FCC did not address the precise form of certification, the FCC requires that it take some form, such as a letter." Arbitration Order at 287. The CLEC Parties would be willing to forego use of a letter as an accommodation to Verizon. In

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be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

47 C.F.R. § 51.5 (emphasis added).

[10] To the extent the Department rejects Verizon's proposal, it should also reject Verizon's related change to Section 4.7.13 as there is no need for applying the definition of the word "affiliate" to the whole amendment. The definition should be limited to the applicable section where it is used, which is the section that defines a Fiber-Based Collocator.

exchange for this concession, it is reasonable that Verizon agree that any electronic certification should involve no more effort than a letter. Verizon, however, refuses to agree.

Onerous certification requirements are anticompetitive. As the Department stated in the Arbitration Order, "'[a] critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process.'" Arbitration Order at 128 (quoting *TRO* ¶ 623). Although the quotation above arose in the slightly different context of EEL eligibility certification, the principle is the same. The Department allowed CLECs to certify eligibility for EELs in a letter, and did not require use of Verizon's electronic ordering systems. Here, the CLEC Parties are willing to go further, and would agree to use those electronic systems. Verizon's refusal to limit the certification process to no more than the equivalent of a letter is unreasonable, and the Department should reject it.

B. Time Limit for Verizon to Dispute Availability — Section 3.6.2.2.

In the Arbitration Order and again in the Reconsideration Order, the Department imposed a 30-day time limit for Verizon to dispute a CLEC order for *TRRO* UNEs. Arbitration Order at 287-88; Reconsideration Order at 28-30. Verizon proposes language that ignores this simple rule. Instead, under Verizon's proposal, it could dispute a CLEC UNE order on a going-forward basis at any time, even after the Department's 30-day deadline. In effect, Verizon's proposal attempts to render the Department's orders regarding this issue meaningless.

The Department should reject Verizon's proposal. The Department's 30-day deadline applies to all challenges, not just those in which Verizon seeks retroactive repricing of the facility in question. Arbitration Order at 287-88; Reconsideration Order at 28-30. The Department particularly noted that to prevent the opportunities for arbitrage that Verizon feared, Verizon should modify its systems so as to be able to generate a dispute letter within 30 days.

Such opportunities for arbitrage, if they exist at all, would exist whether Verizon could reprice retroactively or only prospectively. The Department in no way limited its analysis of the pros and cons of the deadline to the situation where Verizon sought retroactive repricing. The Department's deadline applies in all cases.

Public policy also supports an across-the-board deadline. Key reasons for establishing the deadline were to reduce uncertainty as to whether Verizon would dispute a particular order and to "provide[] guidance to the parties as to their rights and obligations." Arbitration Order at 287-88. These considerations apply with equal force whether Verizon seeks retroactive or only prospective repricing.

C. Pricing If Verizon Prevails in a Dispute — Section 3.6.2.3.

In th event that Verizon prevails in a dispute over the availability of a *TRRO* UNE, the CLEC Parties propose that the price for the facility be set at the lowest price at which the CLEC could have obtained the facility if it had not been ordered as a UNE.[11] Verizon, by contrast, proposes that the price for facilities other than dark fiber be set at the month-to-month special access rate, retroactive back to the date of provisioning, plus late fees and all other applicable charges. Further, in the case of dark fiber, Verizon proposes the specific rate of $1100 per month per mile for the first 20 miles, then $520 per month per mile thereafter.

The Department should adopt the CLEC Parties' proposal and reject Verizon's. The CLEC Parties' proposal is reasonable, while Verizon's is not.

The impairment status of particular wire centers at the ends of any given route is not a yes-or-no proposition at this point in time. The Department specifically declined to undertake a comprehensive review of Verizon's non-impaired wire center list. Instead, the Department

[11] In the case of a CLEC that has a wholesale special access contract with Verizon, the applicable price under the contract would apply.

stated that it will review the impairment status of wire centers on a case-by-case basis in response to a particular dispute, Arbitration Order at 279-83, and reiterated that decision on reconsideration, Reconsideration Order at 16-17.

The CLEC Parties are not aware that the Department has resolved (or even received) any such dispute. Thus, for any given wire center, there remains a reasonable basis for disagreement over the status of that wire center. Other state Commissions have begun comprehensive reviews of the wire center list, but have not yet come to conclusions. *See, e.g., In re Verizon-Maine: Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21),* Docket No. 2002-682, Procedural Order (Dec. 7, 2005);[12] *In re Verizon New Hampshire: Wire Center Investigation,* Docket No. DT 05-083, Order Setting Procedural Schedule, Order No. 24,503 (Aug. 19, 2005).[13] As a result, Verizon and CLECs in Massachusetts cannot even take guidance from those states as to the validity of Verizon's methodology in compiling the wire center list and the accuracy of its results. In short, this is still a very grey area.

That being the case, CLECs should not be penalized for ordering UNEs in wire centers of questionable impairment status. If the wire center were clearly non-impaired, CLECs could order special access or other facilities at term or volume discounts. They should have the same benefit if, in good faith, they turn out to be wrong in their assessment of the wire center's status.

In addition, the Department should reject the specific rates for dark fiber that Verizon proposes should it prevail in a dispute. While Verizon may not be required to price its substitute services at TELRIC, it is still required to charge rates that are just and reasonable. 47 U.S.C. § 201(b); Mass. G.L. C. 159, § 14. But the rates that Verizon has proposed for dark fiber are

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[12] Available at http://mpuc.informe.org/easyfile/cache/easyfile_doc170900.DOC.

[13] Available at http://www.puc.state.nh.us/Regulatory/Orders/2005orders/24503t.pdf.

outrageous. Verizon's proposed rate — $1100 per month per mile for the first 20 miles, $520 per month per mile for additional miles — is *twenty times* the current dark fiber mileage rate of $49.70 per month per mile[14] (and more than *ten times* the current rate after the first twenty miles). It strains credulity for Verizon to suggest that a just and reasonable rate should be twenty times what the Department determined to be the forward-looking cost (plus a reasonable profit) for dark fiber. In any event, Verizon has made no showing to justify its proposed $1100 per mile rate.

Digging even slightly beneath the surface of Verizon's proposed rate reveals the fallacious basis on which it was set. Verizon's proposed rates are the ring mileage rates for its Intellilight Optical Transport Service ("IOTS") [15] — a designed, managed, controlled, SONET-based, lit optical transport service. IOTS is an inappropriate proxy for dedicated dark fiber transport for many reasons, principally because it includes design, management, monitoring, and control services that are not included in the dark fiber offering.[16]

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[14] VZ Tariff DTE MA No. 17, Part M, § 2.17.1 (specifying a rate of $4.97 per 1/10 mile).

[15] VZ Tariff FCC No. 11, §31.7.21.

[16] The tariffs for the two services show how different they are. The differences between the services include, but are not limited to, the following: IOTS is a special access-type lit service customized through intricate design, and highly managed, controlled and serviced by Verizon personnel. The customer obtains (at a premium price) a diversely routed ring architecture or topology designed to provide "managed optical transport of multiple protocols." VZ Tariff FCC No. 11, § 7.2.19(A). Of course, Verizon's tariffed charges are designed to compensate Verizon for all the services and functions associated with designing, operating and "managing" the various levels of transmission capacity that are offered. Under IOTS, Verizon will make available transmission of at least 15 different protocols, ranging from SONET OC3 through OC48 and Gigabit Ethernet, using specific industry technical specifications. *Id.* § 7.2.19(C)(5). Through IOTS, a customer may connect multiple locations. *Id.* § 7.2.19(B). Verizon engineers will perform the design and configuration requirements to provision IOTS ring and Verizon technicians will construct the ring after it and the customer have mutually agreed upon its design. *Id.*

By contrast, under Verizon's dark fiber offering, the CLEC designs, constructs, configures, and manages its own network. This allows a CLEC to design and manage its network, but requires the CLEC to incur the necessary expense to do so. All that Verizon provides the dark fiber customer is an unlit inert pair of fiber optic strands *on an as-is basis*, between two Verizon central offices, nothing more, nothing less. See VZ Tariff DTE MA No. 17, §§ 17.1.1.A, 17.1.2.A.2, 17.3.1.B. And, since the CLEC must be collocated in both offices, the CLEC must place its own (not Verizon's) electronic equipment on each end of the fiber cable in order to "light" the cable so as to provide the necessary transmission capability. *Id.* §§ 17.1.2.A.2, 17.3.1E. In addition, Verizon will only provide dark fiber if spare, unused strands are available; it will not construct dark fiber facilities, nor will Verizon introduce additional splice points to accommodate dark fiber requests. *Id.* § 17.1.1B. Verizon only warrants that the dark fiber was up to

Moreover, Verizon's rate appears designed to punish CLECs that order dark fiber UNEs on ineligible routes, even when done in good faith. The rate applies only if Verizon raises and then prevails in a dispute. It is manifestly unfair to allow Verizon to charge punitive rates in the event that a CLEC orders dark fiber and then proves to be incorrect in its impairment assessment. To allow Verizon to charge such extreme rates will discourage CLECs from placing the first dark fiber order in a wire center whose status is unresolved. The dire consequences of an honest but wrong decision will cast a chill over all CLECs' willingness to place dark fiber orders. Competition and consumers will suffer as a result.

D. Pricing of EELs that Become Noncompliant — Section 3.11.2.2.

The CLEC Parties propose a similar provision for EELs that become noncompliant. The CLEC Parties propose to add a sentence at the end of § 3.11.2.2, so that it reads:

> Without limiting any other right Verizon may have to cease providing circuits that are or become Discontinued Facilities, if a High Capacity EEL circuit is or becomes noncompliant as described in this Section 3.11, and ***CLEC Acronym TXT*** has not submitted an LSR or ASR ***[or other documentation, e.g. if managed as a project]***, as appropriate, to Verizon requesting disconnection of the noncompliant facility and has not separately secured from Verizon an alternative arrangement to replace the noncompliant High Capacity EEL circuit, then Verizon, to the extent it has not already done so prior to execution of this Amendment, shall reprice the subject High Capacity EEL circuit (or portion thereof that had been previously billed at UNE rates), effective beginning on the date on which the circuit became non-compliant, by application of a new rate (or, in Verizon's sole discretion, by application of a surcharge to an existing rate) to be equivalent to an analogous access service or other analogous arrangement that Verizon shall identify in a written notice to ***CLEC Acronym TXT***. ***[The new rate shall be no greater than the lowest rate ***CLEC Acronym TXT** could have otherwise obtained for an analogous access service or other analogous arrangement]***

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specifications at the time it was installed. It does not guarantee that the transmission characteristics of dark fiber will remain constant over time, and takes no responsibility for risks associated with the introduction of future splices on the dark fiber. *Id.* § 17.2.1.C-.D. The CLEC is responsible for designing its own system, and must go through a complicated ordering process to acquire dark fiber from Verizon. *Id.* § 17.1.3.

The purpose of this sentence is to control the price that Verizon may charge for an EEL that becomes non-compliant through the FCC's change in the EEL eligibility criteria. Should an existing EEL fail the new eligibility criteria, the CLEC should be entitled to the lowest price it otherwise could have obtained. [17] Without the proposed sentence, the price becomes the product of Verizon's caprice. This is the antithesis of an interconnection *agreement.* The Department should adopt the CLEC Parties' proposal.

VI. Routine Network Modifications

A. Charges for Routine Network Modifications — Footnotes 2 and 3 to the Pricing Attachment.

In footnotes 2 and 3 of Exhibit A of the Pricing Attachment to the *TRO* Amendment, the CLEC Parties have proposed language that would make clear that Engineering Query and Engineering Work Order charges do not apply to routine network modifications that Verizon is required to perform under the requirements of the *TRO.*[18] *See* 47 C.F.R. § 51.319(a)(8) &(e)(5); Proposed Amendment § 3.12.1. Verizon agrees that Engineering Query and Engineering Work Order charges are not applicable to certain routine network modifications. However, Verizon seeks to limit the prohibition against Engineering Query and Engineering Work Order charges to only those particular routine network modifications for which it is not permitted to charge:

> Engineering Query Charges apply in addition to charges for actual network modification and Engineering Work Order charges where applicable; provided however, that **[if Verizon is not permitted under Sections 1.2-1.4 of this Pricing Attachment to charge for a particular routine network modification that Verizon is required to perform under Section 3.12.1 of the Amendment, then]**_Engineering Query Charges shall not apply to **[that]** routine network modification**/s as described in 3.12.1 of the Amendment/** until such time as

[17] In the case of a CLEC that has a wholesale special access contract with Verizon, the applicable price under the contract would apply.

[18] Consistent with the Department's orders in proceeding, the Amendment should not permit any of the nonrecurring charges proposed by Verizon's Pricing Attachment, including Engineering Query and Engineering Work Order charges (and expedite charges), as well as charges for removal of load coils and bridged taps.

> Verizon may be permitted to charge for **[*such*][the subject]** network modification**[*s*]** in accordance with Section 1.3 of this Pricing Attachment.
>
> Engineering Work Order Charges apply in addition to charges for actual network modification and Engineering Query charges where applicable; provided however, that **[if Verizon is not permitted under Sections 1.2-1.4 of this Pricing Attachment to charge for a particular routine network modification that Verizon is required to perform under Section 3.12.1 of the Amendment, then]** Engineering Work Order Charges shall not apply to **[that]** routine network modification**[*s as described in 3.12.1 of the Amendment*]** until such time as Verizon may be permitted to charge for **[*such*] [the subject]** network modification**[*s*]** in accordance with Section 1.3 of this Pricing Attachment.

While the CLEC Parties welcome Verizon's agreement that Engineering Query and Engineering Work Order charges do not apply to all routine network modifications, Verizon's proposal does not go far enough. Verizon's proposal is vague as to which routine network modifications it may and may not charge for. It therefore begs the question as to which routine network modifications also bear Engineering Query and Engineering Work Order charges. In short, Verizon's proposal postpones inevitable argument over these questions.

An Engineering Query charge is a charge that Verizon imposes when a Verizon engineer supplies information to a CLEC, such as information regarding the type of network modification required to make a facility available to the CLEC, so that the CLEC can decide if it wants to incur the expense of the work. Tariff No. 17, Part A, § 3.3.2.A.13. An Engineering Work Order charge, according to Verizon, "Applies when the [CLEC]'s order requires network modifications and the Telephone Company is required to verify facilities availability, design the service, write the work order, and prepare the special bill generated as a result of construction." *Id.*, § 3.3.2.A.14.

Verizon's proposal fails to acknowledge that Verizon is not entitled to *any* charges for routine network modifications required by the TRO. In its December 15, 2004 Procedural Order, the Department made clear that Verizon would not be allowed to recover any charges for routine

network modifications unless Verizon could show that the costs were not already covered by the costs of the UNE. *Id.* at 31. In response, Verizon admitted that it could not make that showing, and claimed that it would not impose charges for routine network modifications other than those already approved by the Department and in effect. *See* Verizon Letter dated March 1, 2005, filed in this docket.

The Department's Arbitration Order confirmed that Verizon was not entitled to separate charges for the routine network modifications required by the *TRO*. The Order said:

> As we noted above, the issue of recovering for RNMs, commingling, conversions, and other rate activities is moot, because of Verizon's decision to defer to a later case submission of a TELRIC cost study to demonstrate that the rates are reasonable and do not double recover costs already being recovered in existing Verizon rates. Until then, Verizon will not charge for performing these activities, except for those rates for the non-recurring activities (e.g., line conditioning) for which Verizon already has approved rates on file with the Department.

Arbitration Order at 266.

Thus, the Department made clear that the only network modification activities for which Verizon was entitled to charge were those in connection with line conditioning.[19] Those charges were approved in the 2002 TELRIC case. However, the routine network modification requirements at issue here were set out in the *TRO*, well over a year after the Department's TELRIC ruling. The Department simply has not approved any charges for the routine network modifications required by the *TRO*.

The CLEC Parties' proposed language precisely effectuates this Department ruling. The CLEC Parties' proposal would prohibit Verizon from imposing Engineering Query and Engineering Work Order charges for routine network modifications required by the *TRO*. At the same time, it would make such charges subject to Section 1.3 of the Pricing Attachment to the

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[19] Such nonrecurring charges for routine network modifications performed by Verizon in connection with line conditioning must apply only for DS0 loops, for the purpose of providing xDSL services.

Amendment, which would allow such charges to go into effect at such time as the Department or FCC approve them.

Verizon has never demonstrated to the Department the appropriateness of applying Engineering Query and Engineering Work Order charges to the routine network modifications required under the TRO. Whatever showing Verizon made to justify Engineering Query and Engineering Work Order charges in the TELRIC case was made in connection with line conditioning. Verizon has not shown, and the Department and CLECs have not had the opportunity to scrutinize, what types of activities (if any) are required in connection with *TRO*-mandated routine network modifications. Unless and until Verizon makes such a showing, on a proper record, the Department should disallow such charges.

Indeed, Verizon's tariff definitions show the inapplicability of the Engineering Work Order charge to the routine network modifications at issue here. Engineering Work Order charges include a component for "prepar[ing] the special bill generated as a result of construction." Tariff No. 17, Part A, § 3.3.2.A.14. But the Department has disallowed construction charges for routine network modifications, making a bill (special or otherwise) unnecessary. Thus, on its face, the Engineering Work Order rate would result in an overcharge to CLECs — a bill for work that Verizon simply will not perform. Even if some part of the Engineering Work Order charge were appropriate to apply to *TRO* routine network modifications (which it is not), Verizon has not shown how to apportion the charge to avoid an overcharge. As a result, the Department should reject the entire charge.

Moreover, application of these charges to routine network modifications required by the *TRO* is unreasonable. Verizon's charge for an Engineering Query is $106.49 ($166.97 expedited). The Engineering Work Order Charge is $419.01 ($674.76 expedited). Based on the

description in the tariff, CLECs can expect to pay these charges on every UNE requiring routine network modifications. The resulting $525 in additional cost for most DS1s would be an unjustified windfall for Verizon and a significant financial drain for CLECs.

Imposition of Engineering Query and Engineering Work Order charges to routine network modification required by the *TRO* also would violate the FCC's Verizon/MCI Merger Order. *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC05-184 (Nov. 17, 2005). In that order, the FCC adopted and made mandatory Verizon's commitment not to raise UNE rates for two years. *Id.* ¶ 52. Obviously, imposing a non-recurring charge where there was none before increases the cost of the UNE requiring routine network modifications. The Department should reject Verizon's unlawful attempt to increase the rates for UNEs requiring routine network modifications in this way.

Recently, in a case before the New Hampshire Public Utilities Commission involving precisely the same issue, the Commission Staff and certain parties questioned Verizon's inclusion of Engineering Query and Engineering Work orders in its proposed tariff filing for routine network modifications. As in Massachusetts, Verizon conceded that it was unable to show that costs for routine network modifications were not already included in loop rates. Accordingly, Verizon withdrew its proposal to apply Engineering Query and Engineering Work Order charges to high capacity loops. The New Hampshire PUC's approval of Verizon's tariff filing specifically required the elimination of Engineering Query and Engineering Work Order charges from the tariff for high-capacity loop UNEs. *In re Verizon New Hampshire: Tariff*

Filing for Routine Network Modifications, DT 05-120, Order Granting Approval of Proposed Tariff Revisions, Order No. 24,518, at 2 (Sept. 22, 2005)[20].

Precisely the same result should obtain here. The Department should require Verizon to include the CLECs' proposed language making clear that Engineering Query and Engineering Work Order charges do not apply to routine network modifications required by the *TRO* unless and until the Department specifically approves such charges.

B. Obligation to Perform Routine Network Modifications — Section 3.12.1.

Consistent with the Arbitration Order, the Amendment must expressly state that Verizon shall perform routine network modifications "in accordance with 47 C.F.R. § 51.319(a)(8) and (e)(5) and *applicable law*" (emphasis added). In the Arbitration Order, the Department declined to require that the Amendment list all possible routine network modifications that Verizon may be obligated to perform under the FCC's rules. Arbitration Order at 231. In so doing, however, the Department further stated that a Massachusetts CLEC may bring to the attention of the Department any disagreement regarding Verizon's obligation "to perform a certain unlisted task as a [routine network modification]." Id. Thus, the Department contemplated that Verizon may be required to perform a specific task as a "routine network modification," pursuant to a Department order. The reference to "applicable law" proposed by the CLEC Parties is necessary to ensure that Verizon complies with all such orders of the Department defining the scope of Verizon's obligation to perform routine network modifications. The contract language proposed by Verizon unlawfully limits its obligation to perform routine network modifications, and therefore should be rejected by the Department.

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[20] Available at http://www.puc.nh.gov/Regulatory/Orders/2005orders/24518t.pdf.

VII. Provision of UNE Combinations — Section 3.[--].

In section 3.[--] (following § 3.1.1.3), the CLECs propose the following provision: "Combinations. Verizon shall provide access to UNE combinations in accordance with applicable law." Verizon refuses to include this section.

The Department should adopt the CLEC Parties' proposal. The obligation is undisputed: "The parties agree that Verizon is obligated to combine UNEs . . . ." Arbitration Order at 106; *see* 47 C.F.R. § 51.315. Clearly, as with its other obligations, Verizon's performance is governed by applicable law. Thus, as a statement of Verizon's obligations, the CLEC Parties' proposal is unexceptionable. The Department should require that the Amendment include it.

VIII. Commingling — Sections 3.11.1.1 and 3.11.1.2.

Consistent with the Arbitration Order, the Amendment must expressly permit Massachusetts CLECs to commingle Section 251(c)(3) UNEs with *any* network elements and facilities that Verizon provides under other applicable law. Arbitration Order at 140. Indeed, the Department concluded that the commingling obligation imposed on Verizon by the *Triennial Review Order* contemplates commingling of Section 251(c)(3) UNEs with "not only wholesale services obtained under [Verizon's] access tariff or through a commercial agreement with [Verizon], but also... elements or facilities obtained under applicable law, such as § 271, the Merger Conditions and state law."[21]

The CLEC Parties' proposals reflect these Department rulings:

> Verizon will not prohibit the commingling of an unbundled Network Element or a combination of unbundled Network Elements obtained under the Agreement or Amended Agreement pursuant to 47 U.S.C. § 251(c)(3) **[and]** ***[or]*** 47 C.F.R. Part 51, or under a Verizon UNE tariff ***[or under other applicable law]*** **[("Qualifying UNEs")]**, with Wholesale Services obtained from Verizon, but only to the extent and so long as commingling and provision of such Network Element (or

[21] Arbitration Order at 139.

combination of Network Elements) is required under 47 C.F.R. § 51.318***[or other applicable law]***. As required by the Arbitration Order, "Wholesale Services" as used herein include, but are not limited to, any facilities or elements that ***CLEC Acronym TXT*** is entitled to obtain from Verizon pursuant to Section 271 of the Act or other law, if any, that applies; provided, however, that, for the avoidance of any doubt, nothing in this Amendment shall be deemed to require Verizon to provide a non-Section 251 element or facility at TELRIC rates. Moreover, to the extent and so long as required by **[47 C.F.R. § 51.318]*[applicable law]***(subject to Sections 3.11.1.3 and 3.11.2 below), Verizon shall, upon request of ***CLEC Acronym TXT***, perform the functions necessary to commingle or combine **[Qualifying]**UNEs with Wholesale Services obtained from Verizon. The rates, terms and conditions of the applicable access tariff or separate non-251 agreement will apply to the Wholesale Services, and the rates, terms and conditions of the Amended Agreement or the Verizon UNE tariff, as applicable, will apply to the **[Qualifying]** UNEs.

Proposed Amendment, § 3.11.1.1.

Thus, the references to such "applicable law" proposed by the CLEC Parties are both consistent with the Arbitration Order, and necessary to clarify the proper scope of Verizon's commingling obligation under the *Triennial Review Order*. The contract language proposed by Verizon unlawfully limits that obligation, and accordingly, should be rejected by the Department.

These arguments apply equally to Verizon's proposal to insert the word "Qualifying" in section 3.11.1.2.

IX. Transition and Conversion.

A. Discontinued Facility (and related references) — Section 4.7.6.

Consistent with the Arbitration Order, the Amendment must include a definitive list of network elements and facilities that Verizon no longer is obligated to provide under Section 251(c)(3) of the 1996 Act, as ordered by the FCC in the *Triennial Review Order* and the *Triennial Review Remand Order* ("Discontinued Facilities").[22] Specifically, in the Arbitration

[22] *See also* Proposed Amendment of the CLEC Parties at § 3.5.4. The Amendment must make clear that Entrance Facilities do not include those interconnection facilities that Verizon remains obligated to provide under Section

Order, the Department stated that "the list of discontinued facilities must be updated to reflect those facilities that were de-listed in the *Triennial Review Order* and the *Triennial Review Remand Order*. Arbitration Order at 96.

The CLEC Parties' proposal comports with these rulings:

> Discontinued Facility. Any **[*Section 251(c)(3)*]** facility that Verizon, at any time, has provided or offered to provide to ***CLEC Acronym TXT*** on an unbundled basis pursuant to the Agreement or a Verizon tariff, but which has ceased to be subject to an unbundling requirement **[under 47 U.S.C. § 251(c)(3) or 47 C.F.R. Part 51] [*under the TRO or TRRO*]. [By way of example and not by way of limitation,]** Discontinued Facilities as of the Amendment Effective Date **[include the following][*are*]**, whether as stand-alone facilities or combined or commingled with other facilities: . . . .

The contract language proposed by Verizon ("[b]y way of example and not by way of limitation...") contemplates that "Discontinued Facilities" may include network elements and facilities not specifically addressed in the *Triennial Review Order* and the *Triennial Review Remand Order*, and thereby, permits Verizon to treat as "Discontinued Facilities" items that may be addressed in future unbundling orders of the FCC and the Department. Accordingly, the contract language by Verizon flatly contradicts the Arbitration Order, and must be removed from the Amendment.

B. Retrospective Transition Charges — Section 3.8.3.

The Amendment should require that invoices submitted by Verizon to a Massachusetts CLEC for any transition charge or true-up charge include sufficiently detailed information such that the CLEC may identify: (1) the transition rate applied by Verizon; (2) the relevant time period for which the charge applies; (3) reference to Verizon's authority to impose such charge; and (4) the specific facility for which such charge applies. The contract language proposed by the CLEC Parties is both reasonable and consistent with the industry standard billing practices

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251(c)(2) of the 1996 Act. Thus, the contract language proposed by the CLEC Parties makes clear that "Discontinued Facility" is defined subject to § 3.5.4.

used by carriers operating within Massachusetts, and therefore does not unduly burden Verizon in billing CLECs for facilities subject to the transition rates ordered by the FCC.

C. Charges for Conversions of Discontinued Facilities — Section 3.9.3.

Consistent with the Arbitration Order, the Amendment should not impose (or even address) nonrecurring charges for performing conversions because no such charges have been approved by the Department. Arbitration Order at 136 ("Because Verizon has withdrawn its charges from review in this proceeding, there is no need to address these rate issues in this proceeding."). Indeed, the Arbitration Order notes that Verizon voluntarily withdrew from this proceeding its proposed nonrecurring charges for conversions, and further, that Verizon agreed to perform conversions without cost to Massachusetts CLECs, until such time as the appropriate nonrecurring charges are approved by the Department, on the basis of a cost study submitted by Verizon with its next comprehensive TELRIC case. Arbitration Order at 136. Importantly, the Amendment also must not incorporate, by reference, any nonrecurring charges for conversions set forth in Verizon's tariffs, or in a separate agreement between Verizon and any Massachusetts CLEC. The contract language proposed by the CLEC parties appropriately permits Verizon to impose nonrecurring charges for performing conversions *only* as ordered by the Department or by the FCC, in a separate proceeding. Proposed Amendment, Pricing Attachment, § 1.3.

By its proposed contract language, Verizon seeks to narrow the scope of its current obligation to perform conversions, upon request by any Massachusetts CLEC, without charge to the requesting CLEC. Specifically, the contract language proposed by Verizon narrowly defines "conversions" as "records-only changes to convert circuits that are already in service, which do not require Verizon to perform physical installation, disconnect, or similar activities or disconnection of a Discontinued Facility." The FCC's Rule, 47 C.F.R. § 51.316, provides no basis for the limitations suggested by Verizon's proposal. Moreover, the Rule expressly states

that "...an incumbent LEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements." Consistent with the FCC's Rule, the contract language proposed by the CLEC Parties applies to all "conversions" or migrations of Discontinued Facilities to alternative arrangements.

X. Migration of TRRO Embedded Base at the End of the Transition Period — Sections 3.9.1.1, 3.9.2.

A. Timing of Discontinuance or Migration Orders.

Consistent with the Department's ruling in the Arbitration Order, the CLEC Parties seek language permitting them to place orders for conversion or migration of the embedded base up to the end of the transition period. Proposed Amendment, §§ 3.9.1.1 and 3.9.2. Verizon, on the other hand, seeks to require CLECs to place conversion or migration orders at some unspecified date in advance of the end of the transition period, "taking account of any standard intervals that apply, order volumes, and any preparatory activities that [the CLEC] must have completed in advance."

The Department imposed no such requirement for advance placement of conversion or migration orders. To the contrary, "the Department determine[d] that CLECs are permitted to place orders converting UNEs to alternative arrangements *at any time during the transition period.*" Arbitration Order at 75 (emphasis supplied). The CLEC Parties' language simply and straightforwardly effectuates this Department ruling.

Verizon's language apparently is designed to address situations where discontinuance or migration activities are not instantaneous. But, at bottom, Verizon's concern is solely a billing

issue — can Verizon stop charging the TELRIC rate and begin charging a different rate at, and not after, the end of the transition period.

The proposed amendment already contains a remedy for this situation. In section 3.9.2.1, the parties have largely agreed (subject to the working out of some details) upon a mechanism that would allow Verizon to reprice the facility as of the end of the transition period if Verizon is unable to complete the conversion or migration by the end of the transition period. Even if a CLEC submits a conversion or migration order on the last day of the transition period, Verizon will be made whole. There is no need to place orders by some vague advance date. The Department should reject Verizon's proposed advance ordering requirement.

The CLEC Parties have also proposed a provision designed to address the situation where there is a dispute over the availability of UNEs in a particular wire center. This provision states:

> However, if ***CLEC Acronym TXT*** challenges Verizon designation that certain loop and transport facilities are Discontinued Facilities, Verizon shall continue to provision the subject elements as UNEs and then seek resolution of the dispute by the Department or the FCC, or through any dispute resolution process set forth in the Agreement that Verizon elects to invoke in the alternative.

Proposed Amendment, § 3.9.2.1. In essence, this provision would apply the "provision but dispute" principle to the embedded base of UNEs. Much as Verizon is not permitted unilaterally to reject orders when there is a dispute as to the impairment status of a wire center or dedicated transport route, the CLEC Parties' proposal would prohibit Verizon from unilaterally discontinuing or repricing the embedded base when the impairment status of a wire center or route is in dispute. The CLEC Parties' proposal is reasonable, and the Department should adopt it.

Although the CLEC Parties have proposed this language only recently, that should not be fatal to the Department's adoption of the proposal. The proposal is designed to close a recently-discovered loophole, the situation where the impairment status of a wire center or transport route

is unresolved as of the end of the transition period. In addition, the proposal is supported by the Reconsideration Order because in it the Department specifically held that it "has made no determinations as to which wire centers in Massachusetts are non-impaired, and thus, the FCC's rules prohibiting reclassification of wire centers from non-impaired to impaired have not yet been triggered." Reconsideration Order at 23. Thus, it would be inappropriate and unfair to allow Verizon unilaterally to reprice facilities when the Department could well decide that a wire center is impaired and that, therefore, UNE pricing should continue. It makes sense to maintain the status quo while the dispute is pending. The Department should adopt the CLEC Parties' proposal.

B. Identification by Verizon of Substitute Facility in Advance of Migration — Section 3.9.2.

In this section, the CLEC Parties propose to require Verizon to give a CLEC 30 days' notice of the substitute facility to which it proposes to migrate the CLEC's service at the end of the one-year (18 months for dark fiber) transition period.

The CLEC Parties' proposal is reasonable. It gives a CLEC a modest period of time to assess its options regarding substitute services. In addition, it is identical to the 30-day notice period — which Verizon proposed — before Verizon can disconnect facilities at the end of the transition period. *See* Proposed Amendment, § 3.9.2(a).

Having a consistent notice period makes sense for Verizon and CLECs alike. The Department should adopt the CLEC Parties' proposal.

C. Post-Transition Surcharge — Section 3.9.2.1.

This section governs pricing of network elements at the end of the applicable transition period. Verizon proposes a surcharge in the event that its billing system is not capable of applying the repriced rate to the new facility or service. The parties do not disagree that a

surcharge may be appropriate in some circumstances. The parties disagree, however, on how to describe the amount of the surcharge.

The language proposed by the CLEC Parties more accurately reflects the price that Verizon should charge in those circumstances. The CLEC Parties' language states that the surcharge will be a rate equal to the rate for the applicable access, resale, or another analogous arrangement. On the other hand, Verizon's proposed language would make the surcharge equivalent to the applicable access resale or other analogous arrangement. Clearly, that is incorrect. The surcharge should make up the difference between the old rate and the new (presumably higher) rate. The CLEC Parties' language more accurately reflects what the surcharge does. The Department should adopt it.

Conclusion

For the reasons stated above, the Department should adopt the interconnection agreement provisions proposed by the CLEC Parties.

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Dated: January 17, 2006